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| UNITED STATES DISTRICT COURT | |
| DISTRICT OF NEVADA | |
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PHILLIPSE GMUROUSKY,

Plaintiff,

vs.

FBI JUDGE, et al.,

Defendant(s).

3:08-CV-0428-ECR (VPC)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

November 10, 2008

This Report and Recommendation is made to the Honorable Edward C. Reed, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B). For the reason set forth below, it is recommended that plaintiff's complaint be dismissed without prejudice.

I. BACKGROUND

Plaintiff has filed an application to proceed *in forma pauperis* (#4) and a civil rights complaint (#1-1). In his application and financial affidavit, plaintiff states that he is not employed and receives "social security but not enough to support" (#4). Plaintiff indicated in his application that his monthly expenses are \$530.00 to N.M.H.S. (Nevada Mental Health Services) and \$127.00 to the commissary. *Id.* Based upon the foregoing, the court recommends that the motion for *in forma pauperis* be granted. However, the court finds that plaintiff's complaint fails to state a claim upon which relief may be granted, and is in fact frivolous. Therefore, the court recommends that plaintiff's complaint be dismissed without prejudice.

II. DISCUSSION & CONCLUSION

Pursuant to 28 U.S.C. §1915(e)(2), a federal court must dismiss a case in which *in forma pauperis* status is granted, "if the allegation of poverty is untrue," or the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).

1 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
2 provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard
3 under §1915 when reviewing the adequacy of a complaint or amended complaint. Review under
4 Rule 12(b)(6) is essentially a ruling on a question of law. *North Star Inter'l v. Arizona Corp. Comm.*,
5 720 F.2d 578 (9th Cir. 1983). In considering whether a plaintiff has stated a claim upon which relief
6 may be granted, all material allegations in the complaint are accepted as true and are construed in
7 the light most favorable to the plaintiff. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980).
8 Allegations of a *pro se* complaint are held to less stringent standards than formal pleadings drafted
9 by lawyers. *Haines v. Kerner*, 404 U.S. 519 (1972)(*per curiam*). However, if it appears to a
10 certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under
11 the allegations of the complaint, the court may *sua sponte* dismiss the complaint or portions of it.
12 *Halet v. Wand Investment Co.*, 672 F.2d 1305 (9th Cir. 1982). All or part of a complaint filed *in*
13 *forma pauperis* may therefore be dismissed *sua sponte* if the claims lack an arguable basis either in
14 law or in fact. This includes claims based on legal conclusions that are untenable (*e.g.*, claims
15 against defendants who are immune from suit or claims of infringement of a legal interest which
16 clearly does not exist) as well as claims based on fanciful factual allegations, (*e.g.*, fantastic or
17 delusional scenarios).

18 The caption of plaintiff's complaint lists the only defendant as "FBI Judge" (#1-1). The body
19 of plaintiff's complaint contains allegations that he is "metellick" and that he "levitated . . . over a
20 fence." (#1-1) The complaint also contains a request to be "sent back to the Springfield Missouri
21 Prison because can't even get enuf support from social security" (#1-1). The court concludes that
22 plaintiff's claims are based on conclusions that are untenable, fantastical, or delusional scenarios.
23 Therefore, it is recommended that plaintiff's complaint be dismissed without prejudice.

24 The parties are advised:

25 1. Pursuant to 28 U.S.C § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice, the
26 parties may file specific written objections to this report and recommendation within ten days of
27 receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
28

1 Recommendation" and should be accompanied by points and authorities for consideration by the
2 District Court.

3 2. This report and recommendation is not an appealable order and any notice of appeal
4 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

5 **III. RECOMMENDATION**

6 **IT IS THEREFORE RECOMMENDED** that the district court enter an order as
7 follows:

- 8 1. **GRANTING** plaintiff's motion to proceed *in forma pauperis* (#4);
9 2. **ORDERING** the Clerk to file and docket plaintiff's complaint (#1-1); and
10 3. **DISMISSING** plaintiff's complaint **WITHOUT PREJUDICE**.

11 DATED: November 10, 2008.

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14 UNITED STATES MAGISTRATE JUDGE
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